No. _____ 06-1246 MAR 9 - 2007

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In The

Supreme Court of the United States

TIMOTHY PATRICK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition presents three questions concerning *Batson v. Kentucky*, 476 U.S. 79 (1986), *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), and their progeny:

1. Whether the principles established in *Batson/J.E.B.* apply to religion; specifically, whether the principles established in *Batson/J.E.B.* are violated when a prosecutor justifies his use of a peremptory challenge on a black juror by explaining that the juror "sang in church choir."

2. What should a court do when a prosecutor offers multiple justifications for a peremptory strike at the second step of the *Batson* inquiry, one of which is improper: should a court terminate the inquiry and find a violation, or should a court conduct a "mixed motive" analysis in which the burden is shifted to the government to justify the strike, or should the court simply proceed to the third *Batson* step and ignore the improper justification.

3. Whether trial and reviewing courts must conduct a "comparative juror analysis," as set forth in *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005), when assessing the third step of the *Batson* inquiry.

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OPINION BELOW

The court of appeals issued an unpublished opinion, which is included in the Appendix and can be found at 2006 WL 3613214 (9th Cir. Dec. 11, 2006).

JURISDICTION

The opinion of the court of appeals was filed on December 11, 2006. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

1. U.S. Const. art. VI ("no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States").

2. U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

3. U.S. Const. amend. V ("[n]o person shall be . . . be deprived of life, liberty, or property, without due process of law").

4. U.S. Const. amend. VI ("[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury").

5. U.S. Const. amend. XIV ("nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

STATEMENT OF THE CASE

A grand jury in the Southern District of California returned an indictment charging petitioner, Timothy Patrick, with conspiracy to possess with intent to distribute cocaine and possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) and 846.[1] Petitioner proceeded to a jury trial with a codefendant, Edric Jordan. Petitioner and his codefendant are black. Of the 28 potential jurors who could constitute the jury, only two were black.[2]

With respect to the jury selection process, the district court asked some general questions of all of the potential jurors and then asked each juror to provide some basic background information in response to a written set of questions. The district court then allowed both the government and the defense to conduct voir dire of the potential jurors.

As part of its general questioning, the district court asked the potential jurors whether any of them possessed

[1] The district court asserted jurisdiction pursuant to 18 U.S.C. § 3231.

[2] In the federal system, 12 jurors are selected, the defendant receives 10 peremptory challenges, and the government receives 6 peremptory challenges, *see* Fed. R. Crim. P. 24, thereby setting the list of potential jurors at 28. A third juror on the venire was black, but she was not among the first 28 potential jurors, and therefore she could only be an alternate.

"any moral or religious beliefs" that would compel them to follow their own conscience rather than the law as it would be instructed to them. The district court received a negative response from all of the potential jurors. In response to the district court's written questions about personal background, one of the two potential black jurors responded as follows:

> My name is Effie Lard. I reside here in San Diego. I have lived in California for 45 years. I am employed with Rainbow Day Care Center as a site supervisor. I am widowed. I have two children. My daughter spent ten years in the military, and now she is a stay-at-home mom. My son is 33, and he works as a special ed for the San Diego and Vista School District. I have no military experience. I served on a jury at Superior Court four years ago. I feel that I can be fair and impartial in this case.

During its voir dire, the government did not ask any questions of potential juror Lard. The prosecutor did pose a general question to the entire venire as to whether any of the potential jurors had "religious or moral beliefs" that would make it difficult or uncomfortable for them to stand in judgment of another person. No potential juror, including Ms. Lard, gave any such indication.

In its voir dire, the defense asked the potential jurors to give a brief description of their hobbies and to identify any crime television shows that they may watch. In response, potential juror Lard stated: "My hobby is working in my church and I sing in the choir, and I do watch Cold Case."

The government used one of its peremptory challenges to strike Ms. Lard, and the defense made a *Batson* challenge, pointing out that the prosecution struck one of the

few blacks on the venire leaving only one on the jury. The district court found that "there has to be a prima facie showing, and I think there has been. So maybe the next step would be to find out from the government what is their basis for it."

The government gave the following explanation for its peremptory strike of juror Lard:

> We struck Mrs. Lard – well, for a combination of reasons. The first reason was she has a background as a day care supervisor, and she also mentioned she sang in church choir. These are factors that she is usually susceptible to sympathy.
>
> Mr. Jackson [another potential juror] – she made a face. I can't remember the exact comment that he made, but she made a face during one of his comments. And I am not exactly sure what the face meant, but it was a negative reaction. And it wasn't something that he said that would have caused me to wonder, so I had a bad feeling about that. For those reasons we struck her.

The district court then ruled: "I think that strike appears to be, on the face of it, race-neutral, that there is African-Americans on the jury. Apparently, there is also another African-American that was not struck. So it does not appear that race was singled out. And the reasons given appear to be race-neutral. So for that reason I will overrule your objections."

Of the eleven non-black jurors, four worked with children. Juror Jesusa Marquez was a retired school teacher. Juror Edith Jimenez was an instructional assistant with San Diego City schools. Juror Cecilia Ciremele was a high school English teacher. Juror Standlee Spencer

was a high school industrial arts teacher. Moreover, juror Marquez, the retired school teacher, provided the following statement regarding her hobbies: "My name is Jesusa Marquez, and I teach religious education at my church. I do Mary Kay, and I watch Cold Case."

The jury convicted petitioner, and he appealed to the United States Court of Appeals for the Ninth Circuit. On appeal, petitioner raised several issues, including a *Batson* claim. With little analysis, the Ninth Circuit rejected petitioner's contention that the prosecutor's religion-based explanation for the strike was improper. The Ninth Circuit also summarily held that the district court did not clearly err in finding no purposeful discrimination.

ARGUMENT

A. The Court Should Resolve The Conflict Among The Lower Courts In Applying *Batson/J.E.B.* And Hold That It Is Impermissible To Justify A Peremptory Strike By Pointing To A Juror's Mere Involvement In Religious Activities.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Court held that the Equal Protection Clause prohibits a prosecutor from challenging a juror based on race. In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), the Court extended *Batson* to discriminatory challenges to jurors based on gender. A three-step process is used to determine whether a prosecutor has violated *Batson*: (1) a defendant must make a prima facie showing that a peremptory challenge has been exercised based on race: (2) if the showing has been made, the prosecution must offer a neutral basis for striking the juror in question; and (3) in

light of the parties' submissions, the trial court must determine whether purposeful discrimination has been shown. *See, e.g., Miller-El v. Cockrell*, 537 U.S. 322, 328-29 (2003). In this instance, the prima facie showing is "moot" because the district court found that it had been satisfied and required the prosecutor to give a neutral explanation under the second prong. *See Hernandez v. New York*, 500 U.S. 352, 359 (1991).

Petitioner contends that the government failed to satisfy the second prong of the test when it explained that it struck Ms. Lard because "she sang in church choir." In a similar case, Justice Thomas, in an opinion joined by Justice Scalia, has explained that this is an issue worthy of review. *See Davis v. Minnesota*, 511 U.S. 1115, 114 S. Ct. 2120 (1994) (Thomas, J., dissenting from denial of *certiorari*). In *Davis*, the prosecutor used a peremptory strike to remove a black juror, and the defendant objected on *Batson* grounds and requested a race-neutral explanation. The prosecutor explained that she struck the juror because he was a Jehovah's Witness, who "are reluctant to exercise authority over their fellow human beings. . . . " *Davis*, 114 S. Ct. at 2121. "On appeal, [Davis] contended that the prosecutor's explanation for the strike was race neutral, but contended that *Batson* should be extended to prohibit peremptory strikes based on religion." *Id.*[3] Justices Thomas and Scalia explained:

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[3] In this case, although acknowledging that petitioner clearly made a *Batson* objection in the district court, the Ninth Circuit parsed the objection into one based on race and another based on religion and then reasoned that the religion-based aspect of the objection was not sufficiently preserved, thereby subjecting it to plain error review. The procedural posture of this case is identical to *Davis*, where the defendant raised a race-based *Batson* challenge in the trial court and then

(Continued on following page)

> [G]iven the Court's rationale in *J.E.B.*, no principled reason immediately appears for declining to apply *Batson* to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause. The Court's decision in *J.E.B.* was explicitly grounded on a conclusion that peremptory strikes based on sex cannot survive "heightened scrutiny" under the Clause, because such strikes "are not substantially related to an important government objective." In breaking the barrier between classifications that merit strict equal protection scrutiny and those that receive what we have termed "heightened" or "intermediate" scrutiny, *J.E.B.* would seem to have extended *Batson*'s equal protection analysis to all strikes based on the latter category of classifications – a category which presumably would include classifications based on religion.

Davis, 114 S. Ct. at 2121 (citations omitted).

In the more than ten years since the opinion of Justices Thomas and Scalia in *Davis*, the state and lower federal courts have struggled with *Batson*'s application to religion. *See United States v. Brown*, 352 F.3d 654, 666-67 (2d Cir. 2003) (collecting cases and noting conflict); *United States v. DeJesus*, 347 F.3d 500, 509 n.7 (3d Cir. 2003)

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argued on appeal that the religion-based explanation was improper. In *Davis*, Justices Thomas and Scalia did not find that the religion-based argument was insufficiently preserved. Moreover, the Court's precedent makes clear that the *Batson* objection in the trial court was sufficient to preserve this argument. *See Yee v. Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."); *see also Lebron v. Nat'l Railroad Passenger Corp.*, 513 U.S. 374, 378-79 (1995).

(same). Some state courts have declared that strikes based on religious affiliation are unconstitutional. *See State v. Purcell*, 199 Ariz. 319, 18 P.3d 113, 120 (2001); *State v. Hodge*, 248 Conn. 207, 726 A. .d 531, 552-54 (1999); *People v. Martin*, 64 Cal. App. 4th 378, 75 Cal. Rptr. 2d 147, 150-51 (1998). Others have held that religion-based peremptory challenges are forbidden under state law. *See State v. Fuller*, 356 N.J. Super. 266, 279, 812 A.2d 389, 397 (2002); *Thorson v. State*, 721 So. 2d 590, 594 (Miss. 1998). Other states, such as Texas, have held that religion-based peremptory challenges are not constitutionally improper. *See Casarez v. State*, 913 S.W. 2d 468 (1994).

The confusion is perhaps best exemplified by the Third Circuit's divided opinion in *DeJesus*. There, the Third Circuit addressed whether a potential juror's participation in religious activities can serve as a reason for a peremptory challenge under *Batson*. In *DeJesus*, 347 F.3d at 502, the prosecutor struck two potential black jurors. One of the two black jurors, named McBride, stated that: (1) his hobbies involve civic activities with his church; (2) he reads the Christian Book Dispatcher; (3) he holds several biblical degrees; (4) he is a deacon and Sunday School teacher in the local church; and (5) he sings in a couple of church choirs. The other potential black juror, named Bates, stated that: (1) he is an officer and trustee in his church; (2) he only reads the Bible and related literature; and (3) his hobbies are church activities. *Id.* at 502. In defending the challenges, the prosecutor included the potential jurors' religious involvement. *Id.* at 502-03.

In a 2-1 decision, the Third Circuit held that there was no *Batson* violation. The majority explained that because "the government's strikes were based on the jurors' heightened religious *involvement* rather than their

religious *affiliation*, we need not reach the issue of whether a peremptory strike based solely on religious affiliation would be unconstitutional." *Id.* at 510 (emphases added). In other words, the majority held that "[e]ven assuming that the exercise of a peremptory strike on the basis of religious affiliation is unconstitutional, the exercise of a strike based on religious beliefs is not." *Id.* at 510.[4]

Judge Stapleton dissented. *See DeJesus*, 347 F.3d at 513-15 (Stapleton, J., dissenting). He first explained that when the Court extended *Batson* to discrimination based on gender, it "strongly suggested" that *Batson* would extend to any classification receiving "heightened scrutiny." *Id.* at 513-14 (citing *J.E.B.*). He then reasoned:

> One may peremptorily strike a juror for being inarticulate or uneducated. But one may not, I believe, assume that because a prospective juror is of a particular race, gender, or religion, he is inarticulate or uneducated, and then base a peremptory strike on that assumption. Similarly, a prosecutor may undoubtedly strike a juror for being unwilling to sit in judgment of another human being. However, a prosecutor may not, consistent with the Equal Protection Clause, infer solely from a prospective juror's race, gender, or religion that he will be unwilling to sit in

[4] Even if there is any merit to the distinction between religious affiliation and religious involvement, as drawn by the majority in *DeJesus*, it is inapplicable here. All juror Lard said was that she worked in her church and sang in the choir. The minimal activity described cannot possibly constitute such "heightened" religious involvement as to be a permissible basis to exercise a strike. Indeed, the jurors struck in *DeJesus* described much more religious involvement.

judgment of another, and then offer that unwillingness as a permissible basis for a peremptory challenge.

This does not mean that a litigant may not peremptorily strike a juror because of a belief that happens to have a religious basis. But a litigant cannot use a juror's religious affiliation or practice as the sole basis for attributing such a particular belief to the juror. Here, the voir dire transcript reveals no indication from either McBride or Bates that they would be reluctant to convict or pass judgment on another human being. If they had exhibited such a reluctance, the government clearly would have been able to use such a belief, regardless of whether it had a religious basis, as the reason behind a peremptory strike. However, both McBride and Bates indicated precisely the opposite of any such unwillingness: that they would follow the law and base a verdict only on the evidence in the case.

The record makes clear that the sole basis for the government's belief that such reluctance existed was the fact that McBride and Bates were heavily involved in the practice of their religious faith. What the government did was to assume that individuals heavily involved in the practice of their religious faith, as a class, are likely to be reluctant to sit in judgment of others. This is precisely the kind of stereotyping that I believe is foreclosed by the teachings of *J.E.B.* The Court concludes, as did the District Court, that even though striking a juror on account of his religious affiliation may violate Equal Protection, striking him because of his "heightened religious involvement rather than a specific religious affiliation" does not. I cannot agree. A classification based on "heightened religious involvement" is

> no less a classification based on religion than is a classification based on religious affiliation. The government has proffered no authority from Equal Protection or Free Exercise jurisprudence suggesting the contrary and I am aware of none. Once a prosecutor begins discriminating against individuals because they engage in religious activities (regardless of what religion they are or the degree to which they engage in those activities), or because they are non-religious (or engage in only a limited number of religious activities), the prosecutor's actions must be subjected to heightened scrutiny.
>
> Because the prosecution discriminated against Bates and McBride on account of their practice of their religion, I would reverse the judgment of the District Court.

DeJesus, 347 F.3d at 514-15 (footnote and citation omitted).

The Court should resolve the conflict among the lower courts and adopt Judge Stapleton's analysis. As the Court has stated, "stereotypical assumptions" are impermissible under *Batson*. *Hernandez*, 500 U.S. at 361. The religion-based explanation in this case was nothing more than a "stereotypical assumption," as juror Lard did not in any way indicate that she could not sit in judgment of another person or be fair and impartial based on her religious beliefs. Indeed, one commentator has stated:

> Almost inevitably, in such situations the lawyer will respond that it is not the religious affiliation signaled by the activity that is the reason for the peremptory, but rather the intensity with which the juror affiliates himself with the religion that is the problem. While lawyers would perhaps not

put it so bluntly, in essence many feel that, for example, the problem with wearing a yarmulke is not that it signals that a person is Jewish, but it signals that he is very Jewish. It is almost as though the lawyer were saying that he was not striking all the members of a religious affiliation, but just the "real ones" – the ones who are too serious about it.

If *Batson* is going to be extended to religious affiliation and mean anything, this kind of peremptory challenge cannot be allowed. Otherwise, it seems impossible to police lawyers, as they can always say that the juror was struck not for religious affiliation but for the depth of his belief, as signaled by whatever it was that gave away his religious affiliation. . . .

To allow a juror to be struck merely for being "too religious" seems almost as nonsensical as allowing a prosecutor to strike based on skin tone if he states that he is striking not all African Americans but just the ones with particularly dark skin.

However, this does not mean that a person cannot be struck for religious beliefs, at least where they are plausibly relevant to the case at hand. For example, assume a juror wearing a cross states during voir dire that he is a regular churchgoer. Based on that, the prosecutor may be concerned that the juror is unable to judge others. However, at this point the prosecutor's concern is not based on anything other than the juror's affiliation with his religion (and that he is a particularly devout Christian) and hence has not ripened into a legitimate reason for a peremptory challenge. If, however, the prosecutor questions the juror and the juror states that, because of his religion, he believes it is not right to

> judge others, that would be a legitimate reason for a challenge (even if the juror states that he can put that belief aside) since the concern is now based not on a stereotype but on something this particular juror said about his beliefs that is plausibly relevant to his qualifications as a juror.

Daniel M. Hinkle, *Peremptory Challenges Based on Religious Affiliation: Are They Constitutional?*, 9 Buffalo Crim. L. Rev. 139, 192-95 (2005) ("Hinkle") (footnotes omitted).

Finally, the Court's jurisprudence interpreting the Free Exercise Clause of the First Amendment dictates that striking a juror based on religious activity is impermissible. *See* John H. Mansfield, *Peremptory Challenges to Jurors Based Upon or Affecting Religion*, 34 Seton Hall L. Rev. 435 (2004) (conducting an exhaustive analysis of Free Exercise jurisprudence in the context of peremptory challenges).[5] As Professor Mansfield has observed: "Surely it [can]not be argued that though the strength of the policies for peremptories remains the same, the substantive right to be free from sex discrimination is more powerful than the right to the free exercise of religion, a right expressly set forth in the First Amendment." *Id.* at 482. Indeed, some courts and scholars have determined that religion-based peremptories violate *both* the Free Exercise Clause *and* the Establishment Clause of the First Amendment. *See* Hinkle, 9 Buffalo Crim. L. Rev. at 147-48 n.49 (2005) (collecting cases).[6]

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[5] Professor Mansfield also notes that religion-based peremptories may violate Article VI of the Constitution.

[6] Hinkle, however, concludes that the impermissibility of religion-based peremptories is more clearly revealed under an Equal Protection analysis.

In sum, the Court should grant the instant petition to resolve the conflict among the lower courts and hold that a peremptory strike cannot be justified by a juror's mere religious activities.

B. The Court Should Resolve The Conflict Among The Lower Courts As To How To Proceed When A Prosecutor Offers Multiple Reasons For A Peremptory Strike, One Of Which Is Improper.

If the Court determines that the religion-based explanation for the peremptory strike in this case was improper, then another question that has confused the lower courts arises. In this case, the government offered three reasons for the strike: (1) the potential juror sang in the church choir; (2) she was a day care supervisor; and (3) she made an unknown face to an unknown comment by another potential juror. Thus, if the Court determines that the first reason is invalid, the prosecutor still offered two "neutral" explanations. The lower courts have struggled in applying *Batson* when a prosecutor offers both "neutral" and improper reasons for a strike at the second stage of the inquiry.

In *Wilkerson v. Texas*, 493 U.S. 924, 110 S. Ct. 292 (1989) (Marshall, J., dissenting from denial of *certiorari*), Justices Marshall and Brennan suggested that once a prosecutor articulates an improper rationale at the second stage of the *Batson* inquiry, a violation has been established and there is no further need to proceed to the third stage of the inquiry. At least one federal judge and several state courts have supported this approach. *See, e.g.*, *Kesser v. Cambra*, 465 F.3d 351, 376-77 (9th Cir. 2006) (*en banc*) (Berzon, J., concurring); *McCormick v. State*, 803 N.E. 2d 1108, 1112-13 (Ind. 2004); *State v. Lucas*, 199 Ariz. 366, 18

P.3d 160, 163 (2001); *Payton v. Kearse*, 329 S.C. 51, 495 S.E.2d 205, 210 (1998); *Rector v. State*, 213 Ga. App. 450, 444 S.E.2d 862, 865 (1994).

Contrary to this authority, several federal courts of appeals have held that, when confronted with this situation, a court should conduct a "mixed motive" analysis, which shifts the burden to the government to demonstrate that it still would have struck the juror without the improper rationale. *See Howard v. Senkowski*, 986 F.2d 24 (2d Cir. 1993); *see also Kesser*, 465 F.3d at 373-74 (Wardlaw, J., concurring) (collecting cases). Still others have suggested that the Court has not clarified the appropriate framework and that perhaps the burden should not shift to the government; instead, a court should proceed to the third *Batson* prong, ignoring the improper rationale. *See Kesser*, 465 F.3d at 383-84 (Rymer, J., dissenting).

The Court should grant the instant petition to provide guidance as to this question, which has confused the lower courts. Petitioner urges the Court to adopt the approach suggested in *Wilkerson*. Alternatively, the Court should adopt a mixed motive analysis which shifts the burden to the government.

C. The Court Should Clarify That Trial And Reviewing Courts Must Conduct A "Comparative Juror Analysis," As Set Forth In *Miller-El*, When Assessing The Third Prong Of The *Batson* Inquiry.

The Court has recently stated: "More powerful than . . . bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered

reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005). In this case, the district court and the Ninth Circuit failed to conduct a comparative analysis at *Batson*'s third step, even though such an analysis demonstrates purposeful discrimination in this case.

The prosecutor offered three allegedly neutral reasons for striking Ms. Lard: (1) she was a day care supervisor; (2) she sang in the church choir; and (3) she made an unknown face to an unknown comment by another potential juror. With respect to the first purported reason, Ms. Lard stated that she was a "site supervisor" at a day care center.[7] The prosecutor explained, presumably based on the assumption that the juror's job involved work with children, that she would be overly sympathetic. However, the government did not strike four non-black jurors who worked with children in various teaching capacities: a retired school teacher, an instructional assistant with city schools, a high school English teacher, and a high school industrial arts teacher.

The prosecutor also noted that juror Lard sang in the church choir. The prosecutor evidently believed that this

[7] It is not entirely clear what a "site supervisor" does. Although given the opportunity, the government never questioned Ms. Lard to determine whether her occupation could pose a problem, which shows discrimination under the third prong. *See Miller-El*, 545 U.S. at 244 ("we expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike").

was a problem, although the jurors had been asked about religious beliefs twice during voir dire, and Ms. Lard never voiced any comment that would cause concern. Perhaps more importantly, one of the non-black teachers who was not struck stated that her hobby involved teaching "religious education at my church." Once again, a comparative analysis demonstrates discriminatory intent.[8]

In sum, in *Miller-El*, the Court explained that the most "powerful" evidence to consider at the third *Batson* stage is a comparative juror analysis. The Court should clarify that such an analysis is required.

CONCLUSION

For the foregoing reasons, the Court should grant the instant petition for a writ of *certiorari*.

Respectfully submitted,

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[8] The only rationale offered by the government that is not directly refuted by a comparative analysis is the explanation that Ms. Lard made a face when one of the other jurors made a comment. However, the prosecutor could not remember the comment and did not know what the face meant. If an unknown face to an unknown comment made by another juror can justify a strike under *Batson*, then *Batson* will cease to exist. Moreover, the district court never made a finding that such a face was even made.

2006 WL 3613214

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EDRIC JORDAN, Defendant-Appellant.	No. 05-50907 D.C. No. CR-02-1714-MJL MEMORANDUM*

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TIMOTHY PATRICK, Defendant-Appellant.	No. 06-50028 D.C. No. CR-02-1714-MJL

Appeal from the United States District Court
for the Southern District of California
M. James Lorenz, District Judge, Presiding.

Submitted December 7, 2006**
Pasadena, California

(Filed Dec. 11, 2006)

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App. P. 34(a)(2).

Before: PREGERSON, SILVERMAN, and TALLMAN, Circuit Judges.

Edric Charles Jordan and Timothy Patrick appeal their jury trial convictions for conspiracy to possess with intent to distribute cocaine and for possession with intent to distribute cocaine. Jordan also appeals his conviction on two additional counts – possession with intent to distribute cocaine and possession with intent to distribute cocaine base. We now affirm. Because the parties are familiar with the facts and procedural history of this case, we need not recount them here.

I. *Batson* Claim

Defendants objected to the prosecution's peremptory strike of one of three prospective black jurors based on her race.

We agree that the prosecutor's explanation was race neutral.[1] *See Purkett v. Elem,* 514 U.S. 765, 768 (1995) (noting that the explanation need not even be "persuasive, or even plausible"). Furthermore, the district court did not commit clear error when it found that there was no purposeful discrimination after noting that the prosecutor had not struck two other prospective black jurors in the venire.

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[1] We reject the defendants' religion-based *Batson* objection to the prosecutor's explanation. No such objection was raised before the district court, thus we review for plain error. *See United States v. Contreras-Contreras,* 83 F.3d 1103, 1105 (9th Cir. 1996). As neither the Supreme Court nor the Ninth Circuit has extended the reach of *Batson* to peremptory challenges based on religion, any error here was not "plain."

See United States v. Chinchilla, 874 F.2d 695, 698 n.4 (9th Cir. 1989).

II. Reasonable Doubt Instruction

The district court gave the Ninth Circuit's model "reasonable doubt" instruction. *See Ninth Cir. Crim. Jury Inst.* 3.5 (2003). Both contend that the model instruction is defective.

Jordan cannot now challenge the use of Model Jury Instruction 3.5. He requested that it be given in the first place and therefore waived any error. *See United States v. Cain,* 130 F.3d 381, 383-84 (9th Cir. 1997).

We review Patrick's claim for plain error. When Patrick proposed his alternative "reasonable doubt" instruction, he failed to offer any argument on why the model instruction was defective. *See United States v. Klinger,* 128 F.3d 705, 710 (9th Cir. 1997) ("A defendant's mere proposal of an alternate instruction does not satisfy Rule 30's standard of specificity."). We have previously held that the giving of this exact instruction was not plain error. *See United States v. Ruiz,* 462 F.3d 1082, 1086-1087 (9th Cir. 2006).

III. Sufficiency of the Evidence (Jordan only)

Jordan contends that the evidence at trial was insufficient to convict him on Counts One and Two of the indictment. We will not upset the verdict if "after viewing the evidence in a light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979).

Having reviewed the record, we find that the jury had sufficient evidence on both counts.

A. Count One: Conspiracy to Possess

Viewing the evidence in a light most favorable to the government, we hold that a jury could reasonably find that Jordan and Patrick's level of coordination was beyond that of a simple buyer-seller arrangement, and instead conclude that Jordan was a member of the greater conspiracy.

B. Count Two: Possession

The basis for this charge was the 596 grams of cocaine found in Sharea Moore's car. We find that Jordan can be held responsible for Moore's conduct under *Pinkerton* liability. *See United States v. Long,* 301 F.3d 1095, 1103 (9th Cir. 2002) (citing *Pinkerton v. United States,* 328 U.S. 640, 645-48 (1946)).

IV. Improper Vouching (Jordan only)

Because no objection was made before the district court to the prosecution's closing argument, we review Jordan's claims for plain error. *See United States v. Combs,* 379 F.3d 564, 568 (9th Cir. 2004). No such error is present. The prosecutor's comments were *tied to the strength of the evidence,* not to the prosecutor's personal beliefs or prestige of the office. *See United States v. Molina,* 934 F.2d 1440, 1445 (9th Cir. 1991) (noting that the government has "the freedom to argue reasonable inferences based on the evidence").

V. Failure to Prove Drug Quantity Alleged in the Indictment (Jordan only)

Jordan contends that he was entitled to a judgment of acquittal on Count Four because the government did not prove an essential element of the offense – the drug quantity listed in the indictment. We review this claim de novo. *See United States v. Johnson,* 357 F.3d 980, 983 (9th Cir. 2004).

The quantity allegation was not an element of the offense. *See United States v. Toliver,* 351 F.3d 423, 431 (9th Cir. 2003). When the jury found Jordan responsible for less than the 50 grams, he "w[as] not entitled to a judgment of acquittal; rather, the district court was restricted in the maximum sentence it could impose." *Id.* As a result, this claim is without merit.

IV. Base Level Calculation (Patrick Only)

Patrick asserts that the district court miscalculated the quantity of cocaine – 2 kilograms instead of 1.596 kilograms – under U.S.S.G. § 2D1.1. Thus, his base offense level under the Guidelines should have been set at 26, not 28.

We review the district court's interpretation of the Guidelines de novo, the district court's application of the Guidelines to the facts of this case for an abuse of discretion, and the district court's factual findings for clear error. *See United States v. Kimbrew,* 406 F.3d 1149, 1151 (9th Cir. 2005).

We see no error. The district court was within its discretion in finding that two kilograms more accurately reflected the scale of the offense. That is what Patrick paid

for and thought he was getting. It was mere happenstance that his purchase turned out to be a few ounces short. This is in contrast to *United States v. Felix*, 87 F.3d 1057 (9th Cir. 1996), in which a seller unilaterally delivered a lesser amount of drugs than was originally agreed to.

VII. Leader/Organizer Enhancement

Patrick also attacks the district court's reasons for applying the "organizer or leader" enhancement under U.S.S.G. § 3B1.1. We review that determination for clear error. *See United States v. Berry*, 258 F.3d 971, 977 (9th Cir. 2001).

The district court offered the following reasons for the enhancement:

> I believe that the evidence is overwhelming that Mr. Patrick was an organizer and leader of five or more. He is very cool. You could tell on the wire interceptions that took place during trial that he was not an excitable individual. He was very cool, calm and collected. His voice was generally relatively low and somewhat calm in his demeanor. And he was the center, I should say of – when a crisis or problem arose, Mr. Patrick seemed to take the leadership role as to how to proceed.
>
> Now, I do believe that because of his role and what was demonstrated primarily by listening to the wire interceptions and also of the evidence, that he should be attributed the plus 4 *recommended by probation in the probation report and for the reasons set forth.*

(emphasis added).

Before applying the organizer/leader enhancement, the court must find that the defendant exercised "some degree of control or organizational authority over others." *United States v. Mares-Molina,* 913 F.2d 770, 773 (9th Cir. 1990).

That Patrick had a calm demeanor during the intercepted conversations does not demonstrate a leadership capacity over other individuals in the conspiracy. The court did make conclusory statements about Patrick's leadership position, but they were divorced from any reference to specific events or portions of the record.

Nonetheless, the district court also said that it was applying the organizer/leader enhancement "recommended by probation in the probation report." Through this statement, the court adopted the presentence report's findings on Patrick's role in the offense. *See United States v. Rigby,* 896 F.2d 392, 394 (9th Cir. 1990). The report concluded that "Patrick assumed the role of organizer and/or leader during several recorded phone calls, meetings and other activities in order to facilitate the drug distribution conspiracy." This assessment tracks the report's factual findings (and the evidence from the government's wire intercepts presented at trial) showing that Patrick (i) coordinated the two deliveries of the cocaine first from Carlos Rodriguez and Paul Naehrine to Jason Lee McKittrick, then to him, and finally to Jordan and Moore, and (ii) organized a series of conversations with other conspirators about Moore's arrest and shortfalls in the deliveries from Rodriguez.

By adopting the presentence report, the district court made a sufficient factual record for its enhancement. Those findings were not clearly erroneous.

AFFIRMED.